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9 (Union Light Heat & Power Company, Cincinnati

10 Gas & Electric Company, PSI Energy, Inc.);

11 FirstEnergy Corp. and its subsidiaries (Pennsylvania

12 Power Company, Cleveland Electric Illuminating

13 Company, The Toledo Edison Co. and Ohio Edison

14 Company); and American Electric Power and its

15 Subsidiaries (Columbus Southern Power and Ohio Power)

FILED

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16 **IN THE UNITED STATES BANKRUPTCY COURT**

17 **FOR THE DISTRICT OF ARIZONA**

18 In re:

19 BCE WEST, L.P., et al.,

20 Debtors.

21 EID: 38 3196719

Chapter 11 Proceedings

Case Nos. 98-12547-PHX-CGC
Through 98-12570-PHX-CGC

(jointly administered)

**RESPONSE AND OBJECTION TO
MOTION TO DETERMINE ADEQUATE
ASSURANCE OF PAYMENT OF
UTILITIES REQUIRED UNDER 11 U.S.C.
§366**

Hearing Date: October 26, 1998

Hearing Time: 10:00 a.m.

Hearing Location: 2929 N. Central

10th Floor, Ctrm. #6

Phoenix, AZ

22 Cincinnati Corp. and its subsidiaries (Union Light Heat & Power Company, Cincinnati
23 Gas & Electric Company, PSI Energy, Inc.) (collectively "Cinergy"), FirstEnergy Corp. and
24 its subsidiaries (Pennsylvania Power Company, Cleveland Electric Illuminating Company,
25 The Toledo Edison Co. and Ohio Edison Company) (collectively "FirstEnergy") and

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2 American Electric Power and its subsidiaries (Columbus Southern Power and Ohio Power)
3 (collectively "AEP") object and responds to Debtors' Motion to Determine Adequate
4 Assurance of Payment of Utilities Required Under 11 U.S.C. §366. Pursuant to this
5 Objection and Response, Cinergy, FirstEnergy and AEP request that the Motion be dismissed
6 and that the Court direct the Debtors to provide Cinergy, FirstEnergy and AEP with
7 adequate assurance security in the form of deposits in the amounts of \$47,465.00 (Cinergy),
8 \$71,234.50 (FirstEnergy) and \$19,175.71 (AEP), which sums are sufficient to assure
9 Cinergy, FirstEnergy and AEP of payment for services during a normal billing cycle
10 (approximately six to eight weeks, based on applicable state regulations). This Objection and
11 Response is supported by the accompanying Memorandum of Points and Authorities.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. BACKGROUND FACTS.**

14 Prior to the Petition Date, Cinergy provided utility services to approximately 20 of
15 the Debtors' stores and held deposits and/or other security for some of the locations.
16 Pursuant to §366, Cinergy is requesting and is entitled to a total deposit of \$47,465.00
17 (\$9,800 for Union, Heat & Power Company; \$27,065.00 for Cincinnati Gas & Electric
18 Company; and \$10,500.00 for PSI Energy, Inc.), based on the requested amount of deposit
19 for each location identified on the attached Exhibit A, and incorporated by reference.

20 Prior to the Petition Date, FirstEnergy provided utility services to approximately 26
21 of the Debtors' stores and held deposits and/or other security for some of the locations.
22 Pursuant to §366, FirstEnergy is requesting and is entitled to a total deposit of \$71,234.50
23 (\$3,950.00 as to Pennsylvania Power Company; \$40,516.00 for Cleveland Electric
24 Illuminating Company; \$14,675.00 for Toledo Edison Co.; and \$12,093.50 for Ohio Edison
25 Company), based on the requested amount of deposit for each location identified on the
26 attached Exhibit B, and incorporated by reference.

Prior to the Petition Date, AEP provided utility services to approximately 9 of the
Debtors' stores and held deposits and/or other security for some of the locations. Pursuant
to §366, AEP is requesting and is entitled to a total deposit of \$19,175.71 (\$17,732.08 for

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2 Columbus Southern Power and \$1,443.63 for Ohio Power), based on the requested amount
3 of deposit for each location identified on the attached Exhibit C, and incorporated by
4 reference.

5 On October 5, 1998 (the "Petition Date"), the Debtors filed the above captioned
6 bankruptcy proceedings and obtained an order providing for the joint administration of
7 twenty four related cases. As acknowledged in the "Agreed Interim and Proposed Final
8 Order Authorizing Use of Cash Collateral and Granting Adequate Protection" and the "
9 Interim and Proposed Final Order Approving Postpetition Financing and Granting Liens and
10 Super Administrative Priority Pursuant to 11 U.S.C. §364(c) and (d) and Modifying The
11 Automatic Stay" (which orders were entered October 5, 1998), the Debtors were unable to
12 obtain unsecured credit allowable under Section 503(b)(1) of the Code as an administrative
13 expense or unsecured credit allowable under Section 364(a) or 364(b) of the Code.
14 Pursuant to the Orders, the Debtors granted post-petition liens to the pre-petition lenders on
15 what appears to be over-encumbered property of the Debtors and also provided for super-
16 priority administrative claims to the lenders.

17 On October 7, 1998, the Debtors filed a consolidated "Motion to Determine
18 Adequate Assurance of Payment of Utilities Required Under 11 U.S.C. §366" (the "Motion")
19 seeking declaratory and injunctive relief to eliminate the statutory protections mandated for
20 utility providers under 11 U.S.C. §366. The Motion specifically requests the Court to issue
21 a) a declaratory judgement that declares and approves the Debtors' proposal as "adequate
22 assurance of payment" and b) an injunction to prevent Cinergy, FirstEnergy and AEP from
23 exercising their statutory rights under 11 U.S.C. §366 based on the Debtors failure to furnish
24 a "deposit or other security, for service" after the Petition Date.

25 The Debtors' Motion contains no factual basis for the relief requested. Rather, the
26 Motion appears to be premised upon unsupported allegations that:

- (1) Debtors' purportedly maintained satisfactory payment histories with all of its utility service providers prior to the Petition Date;
- (2) Debtors' cash flow would be irreparably harmed by the cessation of utility services;

- (3) Certain of the utilities hold pre-petition security deposits to secure utility services;
- (4) The Debtors have obtained an order allowing them to pay pre-petition debt incurred in the ordinary course of business that may be an available source of providing comfort to the utility companies by providing for the payment of the pre-petition debt due to such utilities;
- (5) Under an the cash-collateral and post-petition financing orders, Debtors might have enough cash to pay for utility services as they fall due;
- (6) Debtors believe that they will be able to pay all post-petition obligations, including utility bills, when due;
- (7) Post-petition utility charges are afforded additional protection because they will be entitled to administrative expense priority status; and
- (8) If any delay in payment occurs, the protections proposed would provide sufficient protection to the utility companies.¹

Individually or collectively, these "factors" are insufficient. Pre-petition payment history is irrelevant for purposes of establishing the credit history of a bankrupt debtor. *See In re Kirtluk*, 76 B.R. 979, 983 n. 2 (Bankr. E.D. Pa. 1987) (the credit history of a debtor can be treated as an unknown). In light of the many restrictions and other risks associated with operations under the provisions of Chapter 11, including the future financial viability of a debtor-in-possession, the pre-petition payment history cannot provide any true indication of the creditworthiness of a Debtor. Additionally, the fact that many (or few) of the utility clients may have had pre-petition deposits is also irrelevant. *See In re Utica Floor Maintenance, Inc.*, 25 B.R. 1010 (N.D.N.Y. 1982) (pre-petition security deposits are not available for use as adequate assurance under §366).

The remaining three factors are also insufficient and for the reasons set forth below, the relief requested by Debtor should be denied and an order should be entered requiring Debtor to provide Cinergy with a total deposit in the sum of \$47,465.00, FirstEnergy with a total deposit in the sum of \$47,466.00, and AEP with a total deposit in the sum of \$19,175.71.

¹ The alleged protections set forth in the Debtors' proposal are not protections at all. Rather such protections are solely for the benefit of the Debtors, including such provisions as forcing the utility to treat each location as a separate and independent account. If anything, the proposal effectively dismantles all protections that the Bankruptcy Code, state law and utility regulations mandate.

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2 **II. THE UTILITIES ARE ENTITLED TO A DEPOSIT OR OTHER SECURITY IN AN**
3 **AMOUNT SUFFICIENT TO COVER AN AVERAGE BILLING CYCLE.**

4 But for these Chapter 11 proceedings, Cinergy, FirstEnergy and AEP could and
5 would require of the Debtors a deposit as to each location served in an amount equal to an
6 estimated two months of service. This would be so whether the Debtors were treated as a
7 single account or as multiple accounts, and whether treated as a new account without
8 established credit or treated as an existing account with prior credit, all in accordance with
9 the appropriate state tariffs and internal policies on file with and approved by the applicable
10 state utility regulatory agencies. The Debtors are not entitled to more beneficial treatment
11 than non-debtors are. In fact, as set forth in 28 U.S.C. §959(b), Congress mandated that the
12 debtor complies with utility demands that conform to the applicable regulatory tariffs and
13 policies. Under 28 U.S.C. §959(b):

14 A debtor in possession shall manage and operate the property in his possession according to
15 the requirements of the valid laws of the state in which such property is situated, in the
16 same manner that the owner or possessor thereof would be bound to do if in possession
17 thereof.

18 In defining the parameters of the rights and obligations of debtors and creditors under
19 the Bankruptcy Code, Congress recognized that utility companies were generally a
20 monopoly, serving as the sole source of electricity for thousands of customers in a given area
21 and that electricity is not sold C.O.D. To prevent the utility from taking actions against a
22 debtor available to and practiced by ordinary vendors, whose services are available on the
23 open market, it enacted 11 U.S.C. §366(a). Section 366(b) represents an intentional
24 compromise reached by Congress to accommodate the debtor and utility companies, fully
25 recognizing the myriad of laws and regulations (state and federal) governing the conduct of
26 each of these entities. Congress specifically provided that the utility's applicable regulatory
tariffs and policies were to govern the relationship between the debtor and the utility
company. 28 U.S.C. §959(b).

To prevent the interruption of utility service and the potential harm, which might
follow, Congress required the utility company under §366(a) and (b) to provide utility service
during the initial twenty (20) days following the filing of the bankruptcy petition. However,

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2 under §366(b), the quid pro quo for the requirement of service is the statutorily defined
3 requirement of a deposit or other security. An administrative claim is already the property of
4 a utility and does not legally satisfy §366(b).

5 The risk of non-payment to Cinergy, FirstEnergy and AEP is compounded when the
6 nature of the service provided is combined with the billing cycles applicable to the Debtors'
7 accounts. The Debtors are billed in arrears for the utility services supplied in the previous
8 month. Thus, even when the Debtors pay their bills "currently," Cinergy, FirstEnergy and
9 AEP receive payment for services rendered at least a month earlier plus the applicable
10 payment period. If that payment pipeline is interrupted for any reason, Cinergy, FirstEnergy
11 and AEP are exposed for a substantial amount of utility services, which have already been
12 provided. Section 366(b) was enacted, in part, to ensure that utility companies are not
13 required to finance a debtor's post-petition operations on an unsecured basis (with the
14 exception of the first twenty days). Thus, at a minimum, combined with the expedited
15 termination provisions in the "proposal" proffered by the Debtors, Cinergy, FirstEnergy and
16 AEP should at least be awarded a deposit equal to 40 days of average usage.

17 **III. AN ADMINISTRATIVE EXPENSE PRIORITY CLAIM CANNOT CONSTITUTE**
18 **ADEQUATE ASSURANCE UNDER §366 AS A MATTER OF LAW.**

19 Section 366(b) of the Code is patently explicit and unambiguous. It requires the
20 debtor to furnish "adequate assurance of payment, in the form of either **a deposit or other**
21 **security.**" 11 U.S.C. §366(b) (emphasis added). Under 11 U.S.C. §101(49), "security" is
22 defined to include a number of items, such as notes, stocks, bonds, certificates of deposit, etc.
23 However, under subsection (B), the definition of "security" expressly excludes, without
24 limitation, any form of "debt or evidence of indebtedness for goods sold and delivered or
25 services rendered." See 11 U.S.C. §101(49)(B)(vii). Consequently, an administrative claim
26 or mere promise of prompt payment is clearly not a deposit. Neither is it "security" because
"debt or evidence of indebtedness for goods sold and delivered or services rendered," is
expressly excluded from the definition of "security." The debtor must provide a utility
company with a deposit acceptable to the utility under the regulatory tariffs and policies, or

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2 other form of acceptable "security" as defined in 11 U.S.C. §101(49). See 28 U.S.C.
3 §959(b). An administrative claim is a "debt or evidence of indebtedness for goods sold and
4 delivered or services rendered" and is not sufficient as a matter of law.²

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6 **IV. SECTION 366(b) AND ITS LEGISLATIVE HISTORY ARE BOTH CLEAR AND UNAMBIGUOUS AS TO THE UTILITY COMPANIES' STATUTORY PROTECTION.**

7 When a statute is plain and unambiguous on its face, the court does not have
8 unbridled discretion to disregard or change the terms of the statute in any other way, based
9 on legislative history or otherwise. *Valentine v. Mobil Oil Corp.*, 789 F.2d 1368 (9th Cir.
10 1986); SUTHERLAND ON STATUTORY CONSTRUCTION, §46.03 (4th ed. 1984). Both §366
11 and the definition of security in §101 are clear, unambiguous. These Code provisions do not
12 permit the Debtors to force a utility company to accept an administrative claim as adequate
13 assurance in lieu of a deposit.

14 If the clear language of the statute was not enough, the legislative history also makes
15 clear that an administrative claim combined with other promises do not satisfy the
16 requirements of Section 366. In enacting the current version of §366, Congress adopted the
17 Senate version of the statute and discarded the House version.³

18 The Commission on the Bankruptcy Laws of the United States recognized that a
19 debtor was typically unable to obtain post-petition service unless all pre-petition bills were
20 paid. Thus, the Report of the Commission on the Bankruptcy Laws of the United States,

21 ² Debtors have cited *Virginia Electric & Power Company v. Caldor, Inc.-NY (In re Caldor,*
22 *Inc.-N.Y.)*, 117 F.3d 646 (2d Cir. 1997) to support the relief requested in the Motion.
23 *Caldor* is not controlling, nor on point. In particular, *Caldor* did not address (and, in fact,
24 ignored) the unambiguous and governing statutory definition of "security" in 11 U.S.C. §101.
25 Moreover, unlike the present case, the Debtors in *Caldor* apparently were sufficiently liquid
26 and did not have super priority administrative expenses priming any potential administrative
expense claims for utility services (as is the case here).

³ The House Version, if adopted, would have permitted the court to consider the feasibility of
an administrative claim as adequate assurance. That version did not become law. Cinergy,
FirstEnergy and AEP recognize that the Court has discretion to modify the deposit or other
security upon a change of circumstances during the administration of the estate. However,
the statute requires the deposit to be posted within the first 20 days. Only after it has been
posted does the court have the authority to modify it and even then the burden of proof
would remain on the Debtors.

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2 Part 1, H.R. Doc. No. 93-137, 93d Cong., 1st Sess (1973) (hereinafter referred to as
3 "Report"), recommended:

4 "that any public utility be prevented from cutting off service to a debtor undergoing
5 rehabilitation because of the non-payment of past bills, provided adequate assurance is
6 given of the payments for current charges."

7 Report at 24 (Chapter I, the Commissioners' Charge and Major Recommendations). The fact
8 that the sole intent of this language was to prevent utility companies from requiring payment
9 for pre-petition services prior to providing post-petition service is expressly stated in the
10 Commission's major recommendations:

11 (12) Public utilities be precluded from conditioning the continuation of service to the estate
12 on payment by the debtor or trustee of pre-petition bills.

13 Report at 28.

14 It is also clear that the Commission never intended to authorize bankruptcy courts to
15 usurp state regulatory schemes for utility companies and their customers. In legislation also
16 recommended by the Commission, §7-104 specifically provided that the operation of the
17 business was to be subject to all applicable state laws pursuant to 28 U.S.C. §959(b). See
18 also *Robinson v. Michigan Consolidated Gas Co., Inc.*, 918 F.2d 579 (6th Cir. 1990).

19 The proposed legislation in Part II of the Commission's Report, §7-105, *Public Utility
20 Service*, specifically incorporated the Commission's recommendations pertaining to payment
21 of pre-petition utility bills in order to secure post-petition services. That section stated:

22 A public utility may not alter its service, refuse service, or otherwise discriminate against a
23 trustee or debtor on the basis that a debt owed the utility for services rendered the debtor
24 prior to the petition was not paid. This section does not preclude the public utility from
25 discontinuing service if the trustee or debtor-in-possession does not furnish adequate
26 assurance of payment for services subsequent to the date of filing of the petition.

27 The Commission advisory note accompanying this provision states that the basis for the
28 adequate assurance of payment provision is based on Festersen, Equitable Powers in
29 Bankruptcy Rehabilitation: Protection of the Debtor and the Doomsday Principle, 46 Am.
30 Bankr. L.J. 311, 319-20 (1972). This article, in turn, expressly stated only one method of
31 providing the adequate assurance. The debtor could retain service if the debtor was:

32 treated in all respects as a new customer (and subject to reasonable requirements to make a
33 deposit securing payment)....

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2 46 Am. Bankr. L.J. at 319.

3 The Commissioners' recommendations and proposed legislation were eventually
4 introduced as H.R. Bill 31 and Senate Bill 32. No significant action on the proposals was
5 taken until 1977, when H.R. 8200, 95th Cong., 1st Sess., as Reported by the House
6 Committee on the Judiciary, was introduced and subsequently debated on the floor of the
7 House of Representatives on October 27 and 28, 1977, and February 1, 1978. Under the
8 original version submitted to the House, Section 366 governing utility service stated:

9 (a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or
10 discontinue service to, or discriminate against, the trustee or the debtor solely on the basis
11 that a debt owed by the debtor to such utility for service rendered before the order for relief
12 was not paid when due.

13 (b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor
14 provides such adequate assurance of payment for service after the order for relief as the
15 court, as soon as practicable after such date but before 30 days after the date of the order for
16 relief, and after notice and a hearing. . . . orders. (Emphasis added.)

17 H.R. 8200, including this version of §366, was passed by the House and sent to the
18 Senate for consideration. However, the Senate Judiciary Committee declined to adopt the
19 House version and decided to take action on its own bill, S. 2266. See Appendix 2, COLLIER
20 ON BANKRUPTCY, Legislative History at V-1 (15th ed. 1990).

21 The Senate bill significantly changed the House version of §366 governing utility
22 service to debtors. Specifically, the Senate's proposed §366 clearly demonstrated its intent to
23 remove unbridled judicial discretion to determine what constitutes adequate assurance of
24 payment. The Senate removed the House version's broad judicial discretion and proposed the
25 following:

26 (b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor
within ten days after the date of filing of the petition, furnishes adequate assurance of
payment in the form of a deposit or other security, for services after the date of the filing of
the petition.... (Emphasis added.)

S. 2266, 95th Cong., 2d Sess., as reported by the Senate Judiciary Committee and Senate
Finance Committee (1978). The Senate Committee Report accompanying Senate Bill 2266
reinforces the proposed changes, and clearly indicates that subsection (b) was designed to
protect the utility (not the debtor) in trade for not allowing the utility to terminate service for

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2 non-payment of pre petition billings. That Report states:

3 Subsection (b) protects the utility company by requiring the trustee or the debtor to provide,
4 within ten days, adequate assurance of payment for service provided after the date of the
5 petition. (Emphasis added.)

6 Report of the Committee on the Judiciary, United States Senate, to accompany S. 2266, S.

7 Rep. No. 95-989, 95th Cong., 2d Sess. (1978). After the Senate sent the bill back to the

8 House, the floor managers of both the House and the Senate met and agreed upon a

9 compromise bill. Appendix 2, COLLIER ON BANKRUPTCY. Legislative History, at XI-1. With

10 the exception that the time period for continued service was extended from 10 to 20 days, the

11 compromise bill adopted the Senate's version of ~ 366 and that version passed the Congress.

12 A joint explanatory statement was published in the CONGRESSIONAL RECORD after
13 the actual debates on the compromise bill, explaining in detail the compromises that were
14 reached and the interpretations of the new language. *Id.* The joint explanatory statements, as
15 contained in the House debate on the compromise bill and the final House debate, are
16 identical:

17 Section 366 of the House amendment represents a compromise between comparable
18 provisions contained in H.R. 8200 as passed by the House, and the Senate amendment.
19 Subsection (a) is modified so that the applicable date is the date of the order for relief rather
20 than the date of filing.

21 Subsection (b) contains a similar change but is otherwise derived from ~ 366(b) of the
22 Senate amendment, with the exception that a time period for continued service of 20 days
23 rather than 10 days is adopted. (Emphasis added.)

24 House Debate on Compromise Bill, 124 Cong. Rec. 4.11047-1117 (daily ed. Sept. 28, 1978),

25 and Final House Debate, 124 Cong. Rec. H 11864-66 (daily ed. Oct. 6, 1978).

26 The foregoing legislative history demonstrates that Congress considered and rejected
what the Debtors are proposing here. Adequate assurance of payment under §366 must be a
deposit or other security. It cannot be a proposal based on the promise of an administrative
claim. Adequate assurance of payment means a guarantee of payment in the form of a
"security" as defined by the Code. Further, §366, as enacted, reflects the Senate version and
was specifically tailored to offset the prohibitions contained in §366(a). Subsection 366(b)
was designed to protect the utility company -- not the debtor.

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2 The spirit of the statute was set forth early in *In re Stagecoach Enterprises, Inc.*, 1
3 B.R. 732 (Bankr. M.D. Fla. 1979) at 734:

4 If the debtor is to be allowed to continue to operate its business, it should pay its utility bills
5 on a current basis and should furnish adequate assurance of payment in traditional forms of
a cash deposit, a payment bond of some similar device.

6 The *Stagecoach* court required adequate payment assurances in addition to the post petition
7 payment. Unfortunately, other cases of the same period (as well as some recent cases,
8 including *Caldor*) somehow seemed to follow the House version which never became law.
9 These cases improperly determined that the court possessed generally unfettered discretion to
10 determine adequate assurances.

11 Even if this Court were to ignore the express language of § 366(b) and determine that
12 an administrative priority claim status can constitute adequate assurance, such a
13 determination must be qualified by the language contained in the legislative history. Even the
14 House version, which did not become law, is critically qualified by the phrase "If an estate is
15 sufficiently liquid" The inference is that if there are adequate, unencumbered cash assets
16 in a debtor's estate, they may be treated by the court, in appropriate circumstances, as the
17 equivalent of a security deposit. The Debtors in these jointly administered cases have not
18 pled or shown that there are sufficient, if any, liquid unencumbered assets and Debtors have
19 the burden of proof. Cinergy, FirstEnergy and AEP have no other alternative but to believe
20 that all of the Debtors' assets are heavily encumbered with the secured lenders, or have been
21 used to secure post-petition financing. There is absolutely no justification for the Debtors'
22 argument that granting administrative priority claim status for a utility bill constitutes
23 "adequate assurance" under §366 and the motion must be categorically and unequivocally
24 dismissed.

25 **V. THIS COURT LACKED JURISDICTION TO GRANT THE INJUNCTIVE RELIEF**
26 **REQUESTED IN THE DEBTORS' MOTION.**

Section 366 of the Bankruptcy Code requires a utility to continue to serve a customer
for 20 days after the order for relief. Thereafter, §366(b) states flatly and unambiguously that
the utility **may discontinue service unless the trustee or debtor furnishes adequate**

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2 **assurances of payment in the form of a deposit or other security** (emphasis added)

3 There is no provision or legal authority for the extension of the 20-day period unless the
4 Debtors have satisfied §366(b). Here, the Debtors have not satisfied §366 (nor will their
5 proposal). If the Court extends the restrictions on termination under these circumstances it
6 cannot do so under §366 and must have another source of authority.

7 Section 105 of the Code is that only other source of authority. However, §105
8 cannot be used to contravene or circumvent the express statutory language of §366. *See In*
9 *re American Hardwoods*, 886 F.2d 621, 625 (9th Cir. 1989) (Section 105 cannot be utilized
10 to circumvent the requirements of a specific Code section). Nor can §105 be utilized to shift
11 the burden of proof from the Debtor. *See Robinson v. Michigan Consolidated Gas Co., Inc.*,
12 918 F.2d 579 (6th Cir. 1990), *See also, Hanratty v. Philadelphia Electric Co. (In re*
13 *Hanratty)*, 907 F.2d 1418 (3rd Cir. 1990). Under §366(b), the burden is on the debtor to
14 provide adequate assurance; and adequate assurance must be provided in every case.

15 Even assuming that § 105 can temporarily be used to restrain and enjoin utilities from
16 exercising their statutory rights under §366, the Debtors' Motion and proposal violate the
17 utilities' substantive and procedural due-process rights. The proposal, if approved, would
18 prohibit the utilities from exercising a Congressionally mandated right to refuse or
19 discontinue service if a deposit or other security is not provided by the debtor. Procedurally,
20 injunctive relief must be requested by complaint. *See*, Bankruptcy Rules 7001 and 7065. *See*
21 *also In re Marion Steel Co.*, 35 B.R. 188 (Bankr. N.D. Ohio 1983). The Debtors' attempt to
22 secure injunctive relief by motion infringes upon procedural due-process rights and cannot
23 bind the utilities either as a temporary restraining order, preliminary injunction, or permanent
24 injunction, under the auspices of §105 of the Code. *See In re Entz*, 144 B.R. 483 (Bankr. D.
25 Ariz. 1984).

26 The Debtors' Motion is also not supported by the minimum factual bases required by
Bankruptcy Rule 7065. To procure and sustain injunctive relief, the pleadings must be
supported by a certified complaint or affidavit with facts that show that immediate and

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2 irreparable injury, loss, or damage will result to Debtors before the utilities could be heard in
3 opposition. Further, the substantive requirements of an injunction have not been satisfied.

4 There are four factors that the Debtor must establish before injunctive relief can be granted:

- 5 1. Debtor must make a strong showing that he is likely to prevail on the merits of the
6 case;
- 7 2. Debtor must show with sufficient facts irreparable harm in the absence of granting an
8 injunction;
- 9 3. The issuance of the injunction would not harm the parties sought to be enjoined; and
4. The public interest lies in favor of the decision.

10 Other than the Debtors' unsubstantiated and conclusionary allegations that it will suffer
11 irreparable harm if the relief is not granted, the Debtors' Motion is devoid of these elements.

12 Even if this Court ignores the express statutory mandates of 11 U.S.C. §366 and 28
13 U.S.C. §959 and interferes with a utility's right to a deposit, the remaining applicable case law
14 is clear that the burden is on the Debtors to prove unequivocally that there is and will be
15 adequate, unencumbered assets in cash to assure the utility that payment for post-petition
16 services is not nor will not be subject to a risk of non-payment. In order to accomplish this
17 showing, the Debtors must: (1) isolate and prove the quality and quantity of property that is
18 and will be unencumbered; (2) isolate the quality and quantity of administrative claims that
19 are and will accrue throughout the pendency of these bankruptcy proceedings; (3) show that
20 the property which is unencumbered or otherwise available shall equal or exceed the amount
21 of administrative claims which may accrue during the pendency of these bankruptcy
22 proceedings; and (4) prove and show that the property which is unencumbered presently will
23 remain unencumbered or available for the benefit of the utilities. Based on the current status
24 of the case, including the cash collateral and post-petition financing orders, the Debtors
25 cannot prove any of the foregoing.

26 CONCLUSION

WHEREFORE, for all of the foregoing reasons, Cinergy, FirstEnergy and AEP
request that the Debtors' Motion be dismissed. It is further requested that the Court direct
the Debtors to provide Cinergy, FirstEnergy and AEP with adequate assurances in the form

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2 of a deposit or other "security" in the amounts of \$47,465.00, \$71,234.50 and \$19,175.71,
3 respectively, which sums are sufficient to assure Cinergy, FirstEnergy and AEP of payment
4 for services during a normal billing cycle (approximately six or eight weeks, depending on
5 applicable state regulations).

6 RESPECTFULLY SUBMITTED this 20th day of October, 1998.

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18 (Union Light Heat & Power Company,

19 Cincinnati Gas & Electric Company, PSI

20 Energy, Inc.), FirstEnergy Corp. and its

21 subsidiaries (Pennsylvania Power Company,

22 Cleveland Electric Illuminating Company,

23 The Toledo Edison Co. and Ohio Edison

24 Company); and American Electric Power

25 and its subsidiaries (Columbus Southern

26 Power and Ohio Power)

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2 I certify that a true and accurate copy of
3 the foregoing was served via facsimile and
4 by regular first class mail this 20th day of
October, 1998 to:

5 H. Rey Stroube, III
6 S. Margie Venus
7 AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
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8 and

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10 LEWIS AND ROCA LLP
40 North Central Avenue
Phoenix, Arizona 85004-4429

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EXHIBIT A

SECTION 366 CHECKLISTCG&E PSI ULH&P XDEBTOR Boston Chicken Inc.

Account Number	Service Address	Mailing Address	Gas	Elec	Security Deposit Request	Pre-Petition Security Deposit
65002061-01	3044 Dixie Highway	PO Box 45598 Atlanta, GA 30320	1	1	5,500.00	
45102055-01	2359 Buttermilk Crossing	PO Box 45598 Atlanta, GA 30320	1	1	4,300.00	

TOTAL: \$9,800.00

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SECTION 366 CHECKLIST

CG&E X PSI ULH&PDEBTOR Boston Chicken Inc.

Account Number	Service Address	Mailing Address	Gas	Elec	Security Deposit Request	Pre-Petition Security Deposit
12202008-02	2692 Madison Road	PO Box 45598 Atlanta, GA 30320	1	3		2,905.00
40802048-01	1195 Kemper Road W.	PO Box 2440 Spokane, WA 99210	X	X	2,615.00	
42302030-01	5201 Delhi	PO Box 2440 Spokane, WA 99210	X	X	2,680.00	
73702011-01	2692 Madison Road	14103 Denver W Pkwy. Golden, CO 80401		3		
94702028-01	1095 ST RT 28	PO Box 2440 Spokane, WA 99290	1	1	2,885.00	
16002034-01	7806 Kingland Drive	PO Box 2440 Spokane, WA 99290	1	1	2,740.00	
32202048-01	4397 Glen Este Williamsville Road	PO Box 2440 Spokane, WA 99290	1	1	2,765.00	
38002005-01	7704 Montgomery Road	PO Box 45598 Atlanta, GA 30320	1	1		2,535.00
62102036-01	8565 Winton Road	PO Box 45598 Atlanta, GA 30320	1	1	2,825.00	
27202087-01	126 McMillan West	PO Box 45598 Atlanta, GA 30320	1	1	3,505.00	
98002021-01	9430 Fields Ertel Road	PO Box 2440 Spokane, WA 99290	1	1		2,950.00
91902092-01	8284 Beechmont	PO Box 45598 Atlanta, GA 30320		X	1,995.00	

94402091-01	8284 Beechmont	P0 Box 2440 Spokane, WA 99210	X		1,160.00	
19302073-01	810 Kemper Road E	P0 Box 45598 Atlanta, GA 30320	X	X	3,895.00	*
08100783-22	3359 Towne Blvd.	P0 Box 2440 Spokane, WA 99210	X	X		3,200.00

TOTAL: \$27,065.00

WdrBankchecklist 366/pr

* Surety Bond in the amount of \$5,440.00 - Employers Insurance of Wausau & Mutual Company

SECTION 366 CHECKLIST

CG&E _____ PSI _____ X _____ ULH&P _____

DEBTOR Boston Chicken Inc.

Account Number	Service Address	Mailing Address	Gas	Elec	Security Deposit Request	Pre-Petition Security Deposit
132352636717	615 E. Carmel Dr.	PO Box 2440 Spokane, WA		X	3,600.00	
550311011013				X	3,000.00	
110463358314	3704 S. Read Road			X	4,000.00	

TOTAL: \$10,600.00

WdfBank/checklist 366.gr

EXHIBIT B

**TO BE SUPPLEMENTED WITH THE SPECIFIC STORES/LOCATIONS AT OR
BEFORE THE HEARING**

EXHIBIT C

Boston Market/ Boston Chicken**Columbus Southern Power**

<u>Account Number</u>	<u>Deposit Amount</u>	<u>Pre Petition Amount</u>
108 815 650 1	\$3,040	\$0.00
100 289 233 1	\$2,560	\$2,098.95
105 671 623 7	\$3,800	\$2,209.74
102 781 401 2	\$2,850	\$5,770.12
108 850 620 3	\$4,000	\$2,389.95
100 259 121 7	\$2,825	\$1,664.41
102 899 172 2	\$2,900	\$1,776.54
103 288 843 2	\$2,960	\$1,823.37
Total	\$24,965	\$17,732.08

Ohio Power

071 843 100 0	\$1,449	\$1,443.63
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